

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DONALD MAY,

Defendant-Appellant.

UNPUBLISHED

April 23, 2013

No. 309818

Calhoun Circuit Court

LC No. 2006-004594-FH

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the trial court's order denying his motion for relief from judgment. For the reasons set forth below, we affirm.

Defendant sought relief from his conviction following his nolo contendere plea for child sexually abusive activity, MCL 750.145c(2), for making or producing child sexually abusive material. Defendant entered his plea on January 19, 2007, and admitted at the hearing that he copied an image containing child sexually abusive material onto two different computer hard drives. At the plea hearing, in finding that there was a factual basis for defendant's plea, the trial court relied on this Court's decision in *People v Hill*, 269 Mich App 505, 517-518; 715 NW2d 301 (2006), in which this Court held that copying an image containing child sexually abusive material constitutes making or producing the material under MCL 750.145c(2). In 2010, our Supreme Court reversed this Court's decision in *Hill*, and ruled that merely copying an image does not suffice for producing or making child sexually abusive material under MCL 750.145c(2). *People v Hill*, 486 Mich 658, 673-675, 678-679; 786 NW2d 601 (2010). In 2011, defendant moved the trial court for relief from judgment pursuant to MCR 6.500 *et seq.*, and, citing the subsequent change in law, challenged whether there was a factual basis for his nolo contendere plea. The trial court denied his motion.

"We review a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of facts supporting its decision for clear error. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes" *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010) (internal citation omitted). Here, the trial court did not abuse its discretion when it denied defendant's motion for relief from judgment because defendant waived all challenges to his factual guilt by pleading nolo

contendere to the charge. *People v New*, 427 Mich 482, 493; 398 NW2d 358 (1986). As explained by our Supreme Court in *New*:

[s]ince a plea of nolo contendere indicates that a defendant does not wish to contest his factual guilt, any claims or defenses which relate to the issue of factual guilt are waived by such a plea. Claims or defenses that challenge a state's capacity or ability to prove defendant's factual guilt become irrelevant upon, and are subsumed by, a plea of nolo contendere. Hence, we hold that a plea of nolo contendere has the same effect upon a defendant's ability to raise an issue on appeal as does a plea of guilty. [*Id.* (footnote omitted).]

Because defendant waived any issues related to his factual guilt, he cannot now assert that there was not a factual basis for his plea. *Id.* Accordingly, he is not entitled to relief.

Moreover, assuming without deciding that the rule from *Hill*, 486 Mich 658, applies retroactively to defendant's motion for relief from judgment, even if defendant did not waive the issue, we hold that the trial court's denial of his motion for relief from judgment was not an abuse of discretion. "A defendant in a criminal case may move for relief from a judgment of conviction and sentence." *Swain*, 288 Mich App at 629, citing MCR 6.502(A). Pursuant to MCR 6.508(D), a trial court will not grant a motion for relief from judgment if, among other reasons, the defendant's motion

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

Here, defendant does not raise a jurisdictional defect, and he raises an issue that could have been raised on appeal had he entered a conditional plea. Indeed, nothing prevented him from entering

a conditional plea and raising this issue on direct review. Therefore, pursuant to MCR 6.508(D)(3), defendant must demonstrate: (1) good cause for his failure to raise the issue¹; and (2) actual prejudice.

Good cause can be established by showing ineffective assistance of counsel, or by demonstrating that “some external factor prevented counsel from previously raising the issue.” *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995). Here, defendant does not argue that his trial counsel was ineffective, nor does he demonstrate that anything prevented him from raising a challenge to the rule of law in *Hill*, 269 Mich App 505, on direct review of his plea. Defendant’s decision not to raise this issue on appeal following his plea does not constitute good cause for failing to raise the issue. See, generally, *People v Watroba*, 193 Mich App 124; 483 NW2d 441 (1992) (the defendant’s own actions cannot establish good cause for failing to raise the issue). Therefore, even if he did not waive the issue, defendant is not entitled to relief on his motion for relief from judgment because he failed to establish good cause. MCR 6.508(D)(3)(a); *Swain*, 288 Mich App at 647.

Affirmed.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra

¹ “[T]he court may waive the ‘good cause’ requirement of MCR 6.508(D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.” *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003), citing MCR 6.508(D)(3). Here, defendant neither alleged before the trial court that he was actually innocent, nor does he argue this on appeal. Thus, he must demonstrate good cause in order to be entitled to relief from judgment.